PERCETAKAN KOLOMBONG RIA SDN BHD
v. WAWASAN IKTISAS SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
IDRUS HARUN JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: S-02-85-01-2014]
2 SEPTEMBER 2016

CONTRACT: *Agreement – Breach – Allegation of – Appellant incurred costs for printing and supply of scratch type parking coupons – Whether letter of quotation, letter of award and letter of acceptance agreed by parties constituted concluded contract – Whether respondent under contractual obligation to order or accept delivery of certain amount of coupons monthly – Whether respondent failed to honour its part of bargain – Whether appellant entitled to claim investment expenses – Whether appellant suffered loss and damages*

The appellant and the respondent entered into negotiations for the printing and supply of the scratch type car parking coupons. The appellant issued a quotation for printing (the letter of quotation) on 26 July 2003 stating amongst others that the quantity which the respondent was to order was estimated at 1.5 million sheets per month. The respondent thereupon by a letter of award dated 31 July 2003, awarded to the appellant the contract for printing and supply of car parking coupons, subject to certain terms and conditions. The appellant accepted the respondent's award by a letter dated 13 August 2003. The agreement to print and supply was duly prepared by the appellant's solicitors. But whilst the appellant duly executed the agreement, the respondent on their part did not sign it. Nevertheless, it was the appellant's pleaded case that their letter of quotation, the respondent's letter of award and the appellant's letter of acceptance formed a legally binding contract between the parties herein. In reliance of the said contract, the appellant had invested a large sum of money in the sum of RM1,888,226.86 on the machines, their renting of premises, chemicals *etc*. As events transpired, the respondent failed to honour their part of the bargain, in that, they had failed to accept delivery or failed to order the coupons to the estimated volume of RM1.5 million sheets as agreed in the contract. Meanwhile, the respondent had instructed the appellant to change the design of the coupons which had already been printed in huge quantities. The appellant had incurred expenses in order to revise these printed coupons and claimed from the respondent payment of the said expenses in the revised sum of RM39,422.40. The respondent failed to do so. The appellant, by reason of the respondent's breach of contract, suffered loss and damage, hence their claim against the respondent in the instant suit for the outstanding

sum of RM39,422.40, the sum of RM1,888,226.86 being the sum invested by the appellant in preparations and to honour their side of the bargain, damages to be assessed, interest and costs. The judge allowed the appellant's claim only in the sum of RM39,422.40 and ruled against the appellant in respect of all other claims. The judge found that the required volume of order that was 1.5 million sheets of coupon a month was not a term of the contract between the parties. The appellant thus appealed against the judge's decision. The issues that arose were (i) whether there was a concluded contract between the appellant and the respondent in respect of the printing of parking coupons; (ii) whether the respondent was under any contractual obligation to order or accept delivery of the estimated 1.5 million sheets of car parking coupons a month; and (iii) whether the respondent had breached the contract when they failed to order or receive the delivery of the alleged agreed quantity of car parking coupons.

Held (allowing appeal)

Per Idrus Harun JCA delivering the judgment of the court:

(1) It is manifest that the court should, in interpreting a contract between two parties (a) be entitled to take into account the circumstances surrounding the making of the contract, including the factual matrix that formed the background to the contract; (b) adopt a common sense approach; and (c) discover the meaning of the agreement from the words which they have used read in the context of the circumstances in which they made the agreement. (para 28)

(2) The letter of award had explicitly stated that both the letter of quotation and the letter of award 'shall form a binding contract between the appellant and the respondent'. This express term, read with the appellant's letter of acceptance, clearly evinced the intention of both parties to have a valid binding contract in the absence of a formal agreement based on the letter of quotation and the letter of award. The logical and correct interpretation which could be given thereon was that a contract could properly be considered to be in existence between the appellant and the respondent based on the letter of quotation, the letter of award and the letter of acceptance. That being the case, the appellant's quote of 1.5 million sheets per month ought to and should form part of the concluded contract between the appellant and the respondent. (para 16)

(3) The agreement to print and supply had included all the terms as stated in the appellant's quotation of 26 July 2003, the respondent's letter of award dated 31 July 2003 and the appellant's acceptance dated 13 August 2003 ('the three documents'). Hence, the meeting of the mind of the parties were based on all the terms in these three documents. Therefore, there was not the slightest room for doubt that the intention

of the parties was clear, that the three documents formed the contract between the appellant and the respondent. The three documents, when read together, showed that there was certainty of parties, price and property for a concluded contract. The appellant, by virtue of the concluded contract, was perfectly entitled to proceed with the printing process. (paras 19-24)

(4) The surrounding circumstances of the case eminently evinced the intention of the parties at that relevant time to commit such monthly quantity delivery of which would be *vide* the respondent's purchase order ('LPO'). The actual order might vary but the monthly estimate would be 1.5 million. The appellant would not have proceeded to invest in the extra machineries, rented extra spaces, purchased extra and different papers and materials unless there was a firm contract with the respondent with a minimum monthly commitment of RM1.5 million sheets of scratch coupons per month. The committed quantity of 1.5 million sheets of scratch coupons was indeed a fundamental term of the contract between the appellant and the respondent. There was sufficient evidence that proved on the balance of probabilities that the respondent had breached the contractual obligation to accept delivery of or to order the estimate volume of 1.5 million sheets of car parking coupons per month from the appellant as agreed in the contract. Premised on this breach, the appellant's claim herein was for the reliance costs that was the expenses incurred prior to the contract and in contemplation of the due performance thereof. (paras 31-39)

(5) Remoteness of damage basically hinges on the knowledge of the respondent that the appellant would be making those investments as claimed by the appellant. The investment costs incurred by the appellant were not too remote based on the facts and evidence. The respondents therefore knew the investments which the appellant would be making in order to honour his part of the bargain. The printing of the scratch coupon required special skills and investments due to the security feature involved. The damages on reliance costs was within the contemplation of the respondent and was not too remote. The damages which the appellant would suffer for breach of contract was indeed not too remote in that a reasonable person in the position of the respondent would have concluded upon consideration of the matter that the given type of loss was likely to result. The appellant had clearly proven their case that they had suffered loss and damage as a result of the breach of the contract. The judge therefore had misapprehended the evidence in dismissing the appellant's claim in respect of all the other claims of the appellant. (paras 41, 42 & 44)

Bahasa Malaysia *Headnotes*

Perayu dan responden telah melakukan beberapa perundingan untuk mencetak dan membekalkan kupon letak kereta jenis bergores. Perayu mengeluarkan sebut harga ('surat sebut harga') pada 26 Julai 2003 menyatakan, antara lain, bahawa kuantiti yang ditempah oleh responden adalah 1.5 juta helaian sebulan. Responden melalui surat award bertarikh 31 Julai 2003, mengawardkan kepada perayu kontrak untuk mencetak dan membekalkan kupon letak kereta itu, tertakluk pada beberapa syarat. Perayu menerima award responden melalui surat bertarikh 13 Ogos 2003. Persetujuan untuk mencetak dan membekalkan telah disediakan oleh peguam perayu. Tetapi semasa perayu melaksanakan perjanjian itu, responden tidak menandatanganinya. Walau bagaimanapun, perayu memplidkan bahawa surat sebut harga, surat award responden dan surat penerimaan perayu membentuk satu kontrak termaktub antara pihak-pihak terlibat. Bergantung pada kontrak tersebut, perayu telah melabur sejumlah besar wang iaitu RM1,888,226.86 ke atas mesin-mesin, penyewaan premis, bahan kimia dan lain-lain. Responden pula tidak memenuhi peranan mereka sewajarnya atas kegagalannya menerima penyerahan atau membuat tempahan kupon-kupon kepada nilai anggaran 1.5 juta helaian seperti yang dipersetujui dalam kontrak. Pada masa yang sama, responden mengarahkan perayu menukar rekaan kupon yang telah dicetak dalam kuantiti yang besar. Perayu telah berbelanja wang untuk menukar kupon yang telah dicetak dan memohon bayaran daripada responden berjumlah RM39,422.40. Responden gagal berbuat demikian. Perayu, disebabkan pelanggaran kontrak oleh responden, mengalami kerugian dan dengan itu memohon terhadap responden jumlah yang belum dijelaskan iaitu RM39,422.40 dan RM1,888,226.86 iaitu jumlah yang dilaburkan oleh perayu bagi bersiap sedia untuk memenuhi tanggungjawab mereka dalam perjanjian, ganti rugi yang harus ditaksirkan, faedah dan kos. Hakim membenarkan tuntutan perayu hanya bagi jumlah RM39,422.40 dan tidak membenarkan tuntutan-tuntutan perayu yang lain. Hakim mendapati bahawa jumlah pesanan 1.5 juta helaian kupon sebulan bukan syarat kontrak antara pihak-pihak terlibat. Perayu dengan itu merayu terhadap keputusan hakim. Isu-isu yang timbul adalah (i) sama ada terdapat kontrak termaktub antara perayu dan responden berkenaan percetakan kupon letak kereta; (ii) sama ada responden di bawah mana-mana obligasi kontrak untuk membuat tempahan atau menerima penyerahan 1.5 juta helaian kupon letak kereta sebulan; dan (iii) sama ada responden melanggar kontrak apabila gagal membuat tempahan atau menerima penyerahan jumlah kupon letak kereta yang telah dipersetujui.

Diputuskan (membenarkan rayuan)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Adalah ternyata bahawa mahkamah harus, dalam mentafsirkan kontrak antara dua pihak (a) berhak mengambil kira keadaan sekitar pembuatan kontrak, termasuk matriks fakta yang membentuk latar belakang

kontrak; (b) mengambil pendekatan yang mengikut akal dan (c) merungkai maksud perjanjian daripada perkataan-perkataan yang digunakan dibaca dalam konteks keadaan perjanjian dibuat.

(2) Surat award menyatakan bahawa kedua-dua surat sebut harga dan surat award 'akan membentukkan kontrak mengikat di antara perayu dan responden'. Syarat ini, dibaca bersama-sama dengan surat penerimaan perayu, jelas memperlihatkan niat kedua-dua pihak untuk membentuk satu kontak yang sah dan mengikat dalam ketidakhadiran perjanjian rasmi berdasarkan surat sebut harga dan surat award. Tafsiran yang betul dan mengikut logik yang boleh diberikan adalah kontrak boleh dianggap wujud antara perayu dan responden berdasarkan surat sebut harga, surat award dan surat penerimaan. Dengan itu, sebut harga perayu berkenaan 1.5 juta helaian setiap bulan harus membentuk sebahagian kontrak maktub antara perayu dan responden.

(3) Perjanjian untuk mencetak dan membekalkan termasuk semua syarat-syarat seperti yang dinyatakan dalam sebut harga perayu pada 26 Julai 2003, surat award responden pada 31 Julai 2003 dan surat penerimaan perayu bertarikh 13 Ogos 2003 ('tiga dokumen'). Oleh itu, pertemuan minda pihak-pihak terlibat berdasarkan semua syarat-syarat dalam ketiga-tiga dokumen ini. Oleh itu, tiada ruang untuk meragui niat pihak-pihak kerana jelas bahawa ketiga-tiga dokumen membentuk kontrak antara perayu dan responden. Ketiga-tiga dokumen, apabila dibaca bersama, menunjukkan bahawa terdapat kepastian pihak-pihak, harga dan kontrak termaktub. Memandangkan wujudnya kontrak termaktub, perayu berhak untuk meneruskan proses percetakan.

(4) Keadaan sekeliling kes jelas menunjukkan niat pada waktu relevan itu untuk mematuhi penyerahan kuantiti bulanan yang dipersetujui melalui tempahan belian responden ('LPO'). Tempahan mungkin berbeza tetapi anggaran bulanan adalah 1.5 juta. Perayu tidak akan meneruskan pelaburannya dalam mesin-mesin, menyewa ruang-ruang, membeli kertas dan bahan melainkan terdapat satu kontrak yang kukuh dengan responden serta komitmen bulanan minimum 1.5 juta helaian kupon bergores sebulan. Kuantiti 1.5 juta helaian kupon bergores adalah syarat asas dalam kontrak antara perayu dan responden. Terdapat keterangan memadai untuk membuktikan atas imbangan kebarangkalian bahawa responden melanggar obligasi kontraktual untuk menerima penyerahan atau untuk membuat tempahan bagi jumlah anggaran 1.5 juta helaian kupon letak kereta sebulan dari perayu seperti yang dipersetujui dalam kontrak. Berdasarkan pelanggaran ini, tuntutan perayu di sini adalah bergantung kepada kos iaitu perbelanjaan sebelum kontrak dan pertimbangan daripada pelaksanaan wajar itu.

(5) Ganti rugi terpencil bergantung pada pengetahuan responden bahawa perayu akan membuat pelaburan itu seperti yang dihujah oleh perayu. Kos pelaburan yang digunakan oleh perayu tidak terlalu terpencil

berdasarkan fakta dan keterangan. Responden-responden oleh itu mengetahui bahawa pelaburan yang akan dibuat oleh perayu adalah untuk memenuhi obligasinya. Percetakan kupon bergores itu memerlukan kemahiran khusus dan pelaburan disebabkan ciri keselamatan terlibat. Kerugian ke atas kos pergantungan adalah dalam pertimbangan responden dan tidak terlalu terpencil. Kerugian yang dialami perayu akibat pelanggaran kontrak tidak terlalu terpencil di mana seorang yang munasabah dalam kedudukan responden boleh membuat kesimpulan apabila mempertimbangkan keadaan bahawa kerugian sebegitu berkemungkinan besar akan berlaku. Perayu telah dengan jelasnya membuktikan kes mereka bahawa mereka mengalami kerugian akibat pelanggaran kontrak. Oleh itu, hakim telah salah faham keterangan apabila menolak tuntutan perayu berkenaan semua tuntutan-tuntutan lain perayu.

Case(s) referred to:
Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2, 7(a), 74

Other source(s) referred to:
Dato' Seri Visu Sinnadurai, *Law of Contract*, 4th edn, vol 2, p 74
Pollock & Mulla - Indian Contract & Specific Relief Acts, 13th edn, vol II, pp 1539, 1546, 1553

For the appellant - Joan Goh; M/s Goh & Assocs
For the respondent - Sonny Durai; M/s Allion Kitingan & Partners

[Editor's note: Appeal from High Court, Kota Kinabalu; Suit No: K22-100-2005 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun JCA:

Introduction

[1] We begin by pointing out the unfortunate fact that the trial of this case took a mere 22 days on diverse dates in the months of April, June and July 2009, the judgment nevertheless, was only delivered on 12 December 2013, some three years after the conclusion of the hearing. The learned judge entered judgment against the respondent (the defendant in the court below) for the sum of RM39,422.40 plus interest of 5% per annum on the judgment sum calculated from 16 February 2004 until full settlement. It is noteworthy that the respondent joined the Mayor of the City of Kota Kinabalu and DBKK Holdings Sdn Bhd as the first and second third parties respectively claiming to be indemnified by the third parties against the appellant's claim.

However, the respondent's claims against the third parties were dismissed for which, we observe, no appeal was filed by the respondent against the dismissal of their claim.

Facts

[2] In the year 2003, the appellant and the respondent *qua* the plaintiff and the defendant respectively in the court below entered into negotiations for the printing and supply of the scratch type car parking coupons. Following these negotiations, the appellant issued a quotation for printing (the letter of quotation) on 26 July 2003 stating amongst others that the quantity which the respondent was to order was estimated at 1.5 million sheets per month. The respondent thereupon by a letter of award dated 31 July 2003, awarded to the appellant the contract for printing and supply of car parking coupons, based on the appellant's quotation letter dated 26 July 2003, for an initial period of two years. The respondent stated in the said letter of award that they had decided to accept the appellant's quotation and award the contract for printing of car parking coupons subject to the appellant agreeing to the terms and conditions which we shall set out *inter alia* as follows:

> 1. The prices quoted by you shall be inclusive of design cost, all equipment, materials and labour used in the printing process, all taxes, delivery charges up to the respondent's office/store and any other incidental costs.
>
> 2. The successful production of a working sample for the scratch type coupons that are acceptable to us and the Dewan Bandaraya Kota Kinabalu within one calendar month from the date of our notification that your design is approved.
>
> 3. To affect delivery for the first batch of the coupons within one calendar month from the date of our first LPO. The coupons can be delivered to us partially every week as proposed in your quotation letter. We provide you with the delivery schedule every time an LPO is issued to you. To effect delivery for all succeeding LPOs within one week from the date of each LPO.
>
> 4. In the event that you are unable to meet the delivery schedule as mentioned in item 3 above, there shall be a penalty of RM20,000.00 for every day the delivery is delayed. This amount represents our minimum daily collection.
>
> 5. You are required to always keep sufficient stock of the printed coupons in your own storage equivalent to at least one month usage by us. You are expected to build up the said stock within 2 calendar months from the date of our first LPO.
>
> 6. The monthly quantity that we will be ordering during the contract period would vary from time to time. Therefore, you are only required to print and deliver to us based on the quantity and delivery schedule as stated in our LPOs, except for the stocks mentioned in item 4 above.

A 7. We would like to remind you that the coupons once printed are considered a commodity and worth whatever face value printed on it. You are to take all necessary precautions and security measure to ensure that no forged coupons come out of your factory and the safety of any stock in your storage.

B 8. You are to enter a formal contract with our company and to bear the cost for the preparation of the contract. The contract shall be for an initial period of 2 years with an option to renew for another 2 years. During the contract period, none of the terms and conditions can be changed or varied unless with mutual written consent. Please proceed to prepare and extend a copy of the contract document for our vetting, correction if any C and eventual execution. Until a formal contract is executed, your Letter of Quotation and this Letter of Award shall form a binding contract between us.

[3] The appellant accepted the respondent's award by a letter dated 13 August 2003.

D **[4]** On or about April 2004, the appellant instructed its solicitors to prepare a formal written agreement to be signed by the parties. The contract, that is, the agreement to print and supply, was duly prepared by the appellant's solicitors in accordance with the appellant's letter of quotation dated 26 July 2003 and the respondent's letter of award dated 31 July 2003.

E **[5]** But whilst the appellant duly executed the agreement, the evidence showed that the respondent on their part did not sign it. Nevertheless, it is the appellant's pleaded case that their letter of quotation dated 26 July 2003, the respondent's letter of award dated 31 July 2003 and the appellant's letter of acceptance of 13 August 2003 formed a legally binding contract between F the parties herein. In reliance of the said contract between the appellant and the respondent, the appellant had invested a large sum of money in the sum of RM1,888,226.86 on the machines, their renting of premises, chemicals, papers, storage, raw materials and start up costs.

G **[6]** As events transpired, the respondent had failed to honour their part of the bargain in that they had failed to accept delivery or failed to order the coupons to the estimated volume of 1.5 million sheets as agreed in the contract. In fact, *vide* a letter dated 29 April 2004, the respondent instructed the appellant to temporarily suspend all further printing of the coupons until further notice despite knowing that the appellant had invested and H commenced printing of the coupons. PW2 in his testimony, told the court that by the time the respondent issued the notice to suspend the contract, the appellant had already printed 9 million pieces of coupons.

[7] Meanwhile, on 14 February 2004, the respondent, in their letter I written to the appellant, had instructed the appellant to change the design of the coupons which had already been printed in huge quantity. The appellant had incurred expenses in order to revise these printed coupons and on 16 April 2004 they wrote to the respondent to claim for payment of the said

expenses in the sum of RM35,422.40. We should mention that the appellant had revised the sum and thus in their statement of claim they claim for the sum of RM39,422.40 instead of RM35,422.40. The appellant alleged that the respondent, despite receiving the appellant's solicitors' letter dated 23 August 2004, failed refused and/or neglected to pay to the appellant the sum of RM39,422.40.

[8] The appellant, by reason of the respondent's breach of the contract, had suffered loss and damage hence they claim against the respondent in the instant suit the outstanding sum of RM39,422.40 as at 16 February 2004, the sum of RM1,888,226.86 being the sum invested by the appellant in preparations and to honour their side of the bargain, damages to be assessed, interest and costs.

The High Court's Decision

[9] The learned judge below basically allowed the appellant's claim only in the sum of RM39,422.40 and interests of 5% from 16 February 2014 until full payment. His Lordship ruled against the appellant in respect of all other claims including the sum of RM1,888.226.86 and did not award costs. It is worthy of note that at the time this suit was filed and after the conclusion of the trial, the statutory interest on judgment debts under the Rules of the High Court 1980 was 8% but by the time the decision was delivered three years later in 2013, every judgment debt carries interest of 5% under the Rules of Court 2012. It was probably for this reason that the learned judge had only awarded interest on the judgment sum at the rate of 5% instead of 8%.

[10] The learned judge found that, whilst the agreement to print and supply was not signed by the respondent, there was a contract which could properly be considered to be in existence between the appellant and the respondent. The contract was based only on the respondent's letter of award dated 31 July 2003 and the appellant's letter of acceptance dated 13 August 2003, therefore the required volume of order that is 1.5 million sheets of coupon a month was not a term of the contract between the parties. The reasons given by the learned judge which we could glean from the judgment were these:

(a) when the appellant forwarded to the respondent its "quotation for printing" dated 26 July 2003, it had made an offer to print parking coupons for the respondent, on the terms stated there; such an offer came within the definition of a "proposal" under s. 2 of the Contracts Act 1950. Under s. 7(a) of the Contracts Act 1950, to convert that proposal into a promise the acceptance must be absolute and unqualified. His Lordship found there was no such absolute and unqualified acceptance by the respondent of the appellant's offer because by the respondent's "letter of award", the respondent had accepted the appellant's offer subject to the appellant's agreement to the terms and conditions set out above;

(b) the respondent introduced many matters which were not mentioned in the appellant's offer. For instance, the price quoted by the appellant was accepted subject to it being "inclusive of design costs", all equipment, materials and labour used in the printing process, all taxes, delivery charges up to our office/store and any other incidental costs. Significantly also, the respondent introduced new terms like the appellant having to pay penalty of RM20,000 every month for any delay in delivering the coupons;

(c) whereas the appellant's offer was to print an "estimated 1.5 million sheets per month", the respondent's letter of award makes no mention of a monthly quantity of 1.5 million sheets. Instead in para. 6 of the respondent's letter of award, the respondent stated that: "The monthly quantity that we will be ordering during the contract period will vary from time to time. Therefore, you are only required to print and deliver to us based on the quantity and delivery schedule as stated in our LPOs except for the stock mentioned in item 4 above";

(d) the respondent's letter of award also introduced another new term not mentioned in the appellant's offer, namely, that the appellant was required to maintain at least one month's stock of parking coupons;

(e) the respondent's letter of award dated 31 July 2003 thus constituted a counteroffer made by the respondent to the appellant. The position in law is that a counteroffer is a rejection of the offer;

(f) the respondent by attempting to accept the appellant's offer on new terms had rejected and terminated the appellant's offer and made a counteroffer for the appellant to print and supply the parking coupons to the respondent upon the terms and conditions stated in the respondent's letter of award dated 31 July 2003;

(g) since the respondent by making a counteroffer had rejected and so terminated the appellant's offer, the words found in the respondent's letter of award stating that "until a formal contract is executed, your letter of quotation and this letter of award shall form a binding contract between us" had no significant or legal effect; and

(h) the terms of the contract entered into between the appellant and the respondent were the terms and conditions stated in the respondent's counteroffer, evidenced by its letter of award dated 31 July 2003 which were accepted absolutely and without qualification on 13 August 2003 by the appellant's letter of acceptance.

[11] The appellant consequently appealed against the learned judge's decision in dismissing the appellant's claim. With respect to interest, the appropriate rate, according to the appellant, ought to be 8% and therefore the appellant urged this court not to impose 5% on the judgment sum contending that the appellant should not be prejudiced due to the late ruling by the learned judge.

Decision

[12] This appeal raises a question whether there was a concluded contract between the appellant and the respondent in respect of the printing of parking coupons and if there was, whether the respondent was under any contractual obligation to order or accept delivery of the estimated 1.5 million sheets of car parking coupons per month. It also raises the question whether the respondent had breached the contract when they failed to order or receive the delivery of the alleged agreed quantity of car parking coupons.

[13] We shall first consider a pertinent question whether there was a formal agreement signed by the appellant and the respondent in regard to the printing and supply of the scratch type car parking coupons during the period in question. The appellant had in fact led evidence as to the existence of a written agreement *viz*, the agreement to print and supply between the appellant and the respondent. However, the evidence revealed that the said agreement was unilaterally signed by the appellant and the respondent contended that the agreement merely remained in draft form and unexecuted. The appellant had apparently adduced evidence through PW2 to show that the respondent did not sign the agreement. However, later in cross-examination of PW2, it transpired that PW2 saw the respondent's representative namely DW1 sign the agreement at the office of the appellant's solicitors.

[14] This fact was nevertheless contradicted by PW1 who earlier in his testimony confirmed that the respondent's representative never signed the agreement. Thus, when it was put to PW2 in cross-examination that PW1 had testified that the respondent never signed the agreement, PW2 eventually admitted that the evidence of PW1 was correct. Consequently, the appellant's evidence at the trial that DW1 was the respondent's representative who signed the agreement had been demolished through the evidence of their own witnesses namely PW1 and PW2. It is now an established fact that the respondent never signed the agreement despite the appellant's averment in the statement of claim that the respondent had signed it. We are therefore of the considered opinion that the learned judge correctly made a finding that no formal agreement was executed by the respondent.

[15] We had given anxious consideration to the appellant's letter of quotation of 26 July 2003 which the learned judge had very little hesitation in finding that the said letter of quotation was a proposal but not a promise under s. 7(a) of the Contracts Act 1950. This was so, according to the learned judge, because there was no absolute and unqualified acceptance by the respondent of the appellant's offer on 31 July 2003 since the respondent had accepted the appellant's offer subject to the appellant's agreeing to the terms and conditions set out in the letter of award. The respondent, the learned judge said, by attempting to accept the appellant's offer on new terms had rejected and terminated the appellant's offer and made a counteroffer upon

the eight terms and conditions set out in the letter of award for the appellant to print and supply the parking coupons to the respondent. The learned judge nonetheless found that a concluded contract came into existence when the appellant accepted the letter of award by the letter of acceptance dated 13 August 2003. As regards the words which appear in item 8 of their letter of award stating that "until a formal contract is executed, your letter of quotation and this letter of award shall form a binding contract between us", the learned judge held that since the respondent, by making a counteroffer had rejected and terminated the appellant's offer, these words had no significance or legal effect.

[16] With due respect to the learned judge, we are of the view that the above finding is patently fraught with fallacious argument. The learned judge in arriving at this finding did not seem to realise that such finding seemed to be seriously out of sync with his earlier ruling that the respondent's counteroffer had rejected and terminated the appellant's offer and the term that "until a formal contract is executed, your letter of quotation and this letter of award shall form a binding contract between us" clearly forms and is an integral part of the so-called counteroffer. At the risk of repetition, we should mention that the letter of award which contains the counter-offer has explicitly stipulated that the said term and that both the letter of quotation and the letter of award "shall form a binding contract" between the appellant and the respondent. This express term, read with the appellant's letter of acceptance clearly evinced the intention of both parties to have a valid binding contract in the absence of a formal agreement based on the letter of quotation and the letter of award. His Lordship had obviously, without giving any reason, isolated this unequivocal term from the rest of the terms and conditions of the counteroffer when he erroneously reached the conclusion that the letter of quotation was only a proposal and that the concluded contract was based only on the letter of award dated 31 July 2003 and the letter of acceptance dated 13 August 2003. In the event, based on the term in question, the logical and correct interpretation which can be given thereon is that a contract could properly be considered to be in existence between the appellant and the respondent based on the letter of quotation, the letter of award and the letter of acceptance. That being the case, the appellant's quote of 1.5 million sheets per month ought to and should form part of the concluded contract between the appellant and the respondent.

[17] The appellant, whilst agreeing that a counteroffer amounted to a rejection of the offer, submitted that the proposition did not apply to the present action as this was not the case here. This was because, although the respondent's letter of award came with new terms, it however repeated and revived the appellant's letter of quotation dated 26 July 2003 when it stated:

> **Your revised Letter of Quotation dated 26th July 2003 is referred**.
>
> We are pleased to inform herewith that **we have decided to accept your latest revised quotation** to award to your company the contract of car

> parking coupons under the jurisdiction of the Dewan Bandaraya Kota Kinabalu, subjected (sic) to your agreement to the following terms and conditions.
>
> Please proceed to prepare and extend a copy of the contract document for our vetting, correction if any and eventual execution. **Until a formal contract is executed, your Letter of Quotation and this Letter of Award shall form a binding contract between us**. (emphasis added)

Reference in this connection may be made to *Law of Contract: Dato' Seri Visu Sinnadurai*, 4th edn, vol. 2 at p. 74 wherein the learned author said:

> If offer and acceptance analysis is not always necessary or sufficient, principles such as the general principle that a rejection of an offer brings it to an end cannot be universal. A rejected offer could remain **operative if it were repeated, or otherwise revived or if in the circumstances it should for some other reason be treated, despite its rejection, as remaining on foot, available for acceptance** or for adoption as the basis of mutual assent manifested by conduct. (emphasis added)

[18] Hence, applying the above excerpt to the present case, we are satisfied that there is certainly force in the above contention as the appellant's offer had been manifestly repeated and revived by the respondent which they had readily accepted all of the terms as stated in the appellant's quotation dated 26 July 2003. It does seem clear to us that any variation of terms which the respondent might have done to the appellant's quotation dated 26 July 2003 was duly accepted by the appellant when they issued the letter dated 13 August 2003 which explicitly stated as follows:

> I would like to confirm that we have received the Letter of Award concerning the contract for printing of car parking coupons on 31st July 2003.
>
> **Concerning the terms and conditions you have included in the previous letter, basically we are satisfied and therefore have accepted it**. (emphasis added)

[19] In our judgment, this is indeed the logical and glaring conclusion as it is obvious from the evidence that the agreement to print and supply had included all the terms as stated in the appellant's quotation of 26 July 2003, the respondent's letter of award dated 31 July 2003 and the appellant's acceptance dated 13 August 2003 (the three documents). In fact, PW1 had clearly testified that he had been given the three documents when he was instructed by the appellant to prepare the agreement to print and supply. Hence, the meeting of the mind of the parties were based on all the terms in these three documents. Therefore, there is not the slightest room for doubt that the intention of the parties was clear, that is, and we reiterate, the three documents formed the contract between the appellant and the respondent.

[20] The evidence of PW1 showed that when amendments were made to the print and supply agreement by the respondent before it was finalised to be signed, the respondent did not make any amendment to the salient terms

of the said print and supply agreement. It would thus be reasonable to infer that when no such amendments were made, this was patently indicative of the respondent's agreement to the said salient terms which manifestly included all the terms in the three documents. In a case of this nature wherein the court was required to determine whether a legally binding contract had been concluded between the parties, if a contract was supposedly formed through an exchange of correspondence, the court would have to construe the entire correspondence between the parties in order to be satisfied that all the essentials of a valid binding contract were present. As His Lordship Gopal Sri Ram JCA (as he then was) in the case of *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746 had said:

> There was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant; it had been accepted by the plaintiff. There was consideration. There was also certainty of parties, certainty of price and certainty of the property.

[21] With deference to the learned judge, there was clearly a misdirection when His Lordship, having apparently considered the appellant's offer in their letter dated 26 July 2003, ruled that the same was outrightly rejected by the respondent and hence the document in question did not form part of the terms of the contract between the appellant and the respondent. Having perused the said letter, it is plain that the same provided the details such as the price of printing the coupons, the quality of papers to be used, the size of the coupon, the terms of delivery and the estimated monthly order of 1.5 million sheets per month. Therefore, if the contract between the appellant and the respondent did not include the appellant's quotation of 26 July 2003, it is beyond question that the manifest effect would be that there would be no price for the printing of the coupons and we need only say on this aspect that how then could a contract be concluded when the price for printing was not a term of the contract. Pausing there, it is eminently obvious that when the three documents were read together, it appears to us that in truth, there was certainty of parties, certainty of price and certainty of property for a concluded contract as decided by the Court of Appeal in *Cipta Cermat*.

[22] The learned judge had quite clearly decided that the monthly commitment of 1.5 million sheets of coupons per month was not a term of the contract between the appellant and the respondent due to the fact that the appellant's quotation dated 26 July 2003 did not form part of the term of the contract. His Lordship held that the appellant was supposed to print coupons only upon receiving the local purchase orders from the respondent, the quantity of which would vary. The learned judge further held that the contract which the appellant said it relied on was the first agreement which was the agreement to print and supply and that the appellant could not rely thereon as the said agreement was not signed by the respondent. This finding is, in our opinion, flawed as at no time did the appellant rely on the unsigned agreement as the "contract" between the appellant and the respondent. The

appellant's claim as clearly demonstrated in the statement of claim was premised on the contract which was based on the appellants' letter of quotation, the respondent's letter of award and the appellant's letter of acceptance that was the appellant's pleaded case. The appellant referred to the agreement to print and supply (which PW1 had confirmed that it was ready for signing) merely as evidence of the circumstances surrounding the making of the contract including the factual matrix that formed the background to the contract.

[23] The terms relied on by the appellant were the three documents. In fact, the appellant had merely relied on the print and supply agreement to show the intention of the parties at that material time especially on the monthly commitment of the estimated 1.5 million sheets of coupons by the respondent. The print and supply agreement as drafted by PW1 which was ready for execution and clearly spelled out the 1.5 million sheets of monthly commitment was indeed the "contemporaneous document" and "other relevant fact" which the learned judge should have taken but failed to take into consideration.

[24] Furthermore, PW2 had testified that if the dealing with the respondent was merely based on the purchase orders (LPOs) with no monthly commitment of 1.5 million pieces of coupons a month, he would not invest in the machineries because scratch coupon printing in Sabah at that time was very rare and there was no demand for it. The appellant therefore would not be able to service the monthly leasing on the machines if there was insufficient volume. PW2 had also testified that he was paying a monthly lease for the machines and the appellant had invested about RM1,888,226.86 on the machines, renting of premises, chemicals, papers, storage, other raw materials and start up costs. He also told the court that at the time the respondent gave him notice to suspend the printing, he had already printed over 9 million pieces of coupons. It ought to be emphasised that the learned judge had also accepted that the appellant had printed a total of 9,304,250 parking coupons. PW2's justification for printing such huge quantity of coupons was that, because of the overall and continuous process to print the scratch coupon which took a while that is assuming the printing started in the first month, it would only become a finished product on the fourth or fifth month. PW2 also testified that if he was not able to meet the demand of the respondent, he would have to pay the respondent a penalty of RM20,000 per day which represented the respondent's daily parking fee collection. That is why PW2 proceeded with the printing process. PW2 further testified that he had proceeded to make the investment after receiving the respondent's letter of award dated 31 July 2003 and after the appellant issued the letter of acceptance dated 13 August 2003. In our judgment, the appellant, by virtue of the concluded contract, was perfectly entitled to proceed with the printing process.

[25] The interpretation of the terms of the contract by the learned judge, with due respect, defied logic because on the one hand His Lordship acknowledged that the appellant was only required to supply based on the respondent's LPOs which would vary from time to time and on the other hand His Lordship seemed to acknowledge that there was a requirement for the appellant to maintain one month stock, so that if there was no monthly commitment, how then could the appellant be expected to keep and maintain a month stock. A pertinent question that arose was, what then was the figure for the one month stock which the appellant was required to maintain if not the estimated 1.5 million sheets.

[26] Pausing here, it is clear to us that the appellant could rely on the surrounding circumstances we have mentioned above. Such reliance had found favour with decided cases which had shown that the appellant was clearly entitled to do. The essential point is that the court can gauge the meaning of the agreement from the words which the parties have used, the intention of the parties as evinced in the contemporaneous documents or from other relevant facts, taking into account the context of the circumstances in which they made the agreement.

[27] This court in *Cipta Cermat* also relied on the following authorities and principles in interpreting whether there existed a contract between two parties which were as follows:

Rossiter v. Miller [1878] 3 App Cas 1124 Lord Blackburn said:

> But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties does not itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties to that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is complete.

Second, *G Percy Trenthan Ltd v. Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25. That was a case in which the like question as in the present instance arose, namely, whether the parties had made a binding contract. Steyn LJ (as he then was) said that in such a case as the present, the governing criterion is the reasonable expectations of honest men and that the yardstick is reasonable expectations of sensible businessmen.

In *Bank of Credit and Commerce International SA v. Munawar Ali* [2002] 1 AC 251 at p. 281, Lord Clyde said that the exercise of contractual interpretation:

> Is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

In *Union of India v. M/s DN Revri & Co & Ors* AIR 1976 SC 2257, Bhagwati J said:

> It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other documents. The meaning of such contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation.

It is a guideline to contractual interpretation that a court is not confined to look only at the formal contract. It is entitled to take into account the circumstances surrounding the making of the contract, including the factual matrix that forms the background to the contract (see *Keng Huat Film Co Sdn Bhd v. Makhanlal (Properties) Pte Ltd* [1984] 1 MLJ 243. Essentially the approach is objective. The court is not concerned with the subjective intention of the parties. It is their imputed intention that is relevant. Lord Clyde in *Bank of Credit and Commerce International SA v Munawar Ali* put the approach in this way:

> The knowledge reasonably available to them (the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they never in fact had any conscious intention in relation to that eventuality. *It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement*. (emphasis added)

[28] From the above excerpts, it is manifest that the court should, in interpreting a contract between two parties:

(a) be entitled to take into account the circumstances surrounding the making of the contract, including the factual matrix that forms the background to the contract;

(b) adopt a common sense approach; and

(c) discover the meaning of the agreement from the words which they have used read in the context of the circumstances in which they made the agreement.

Hence the learned judge had clearly misapprehended the law and fact when he decided that "the plaintiff cannot rely on what is stated in the draft first agreement which was never signed by the defendant". His Lordship did not seem to realise that, in determining the real intention of the parties, he had undoubtedly and outrightly rejected the relevant evidence relating to the whole circumstances leading to the conclusion of the contract including the finalised agreement which was ready for signing.

[29] We now turn to the next point that had been pressed on us by the respondent that there was no monthly commitment of 1.5 million sheets of coupon in that the appellant was supposed to order only based on the respondent's purchase orders (LPOs) and that the appellant was supposed to gauge the required monthly usage of the coupons to keep stocks. With due respect, such interpretation of the contract between the appellant and the respondent at that material time was misconceived as it did not appear to be in sync with the circumstances and the contemporaneous documents of this case as earlier stated. It is abundantly clear that in a letter dated 14 February 2004, the respondent had told the appellant to proceed with the printing of coupons. At that time LPOs were yet to be issued by the respondent. The first LPO was issued only on 21 February 2004. In this same letter, the respondent had acknowledged that there was a huge quantity of the coupons which had been printed when it was precisely expressed therein "in view that a huge quantity of these coupons have been printed based on the previous design". This letter clearly showed that the printing had commenced without LPO and the respondent knew it and had in fact instructed for such printing.

[30] The factual matrix of this case that could not be ignored was that at that relevant time there were no printers who could print the scratch coupons without making the extra investment because it required special skills and knowledge and due to the security feature of the scratch coupons which was regarded as a commodity. These facts would have been imputed to the respondent when DW1 in his own testimony admitted during cross-examination that he had done his research and inquiries on the costs factor for the printing of the scratch coupon. He also agreed that he had made many inquiries, talked to many printers even to printers in Peninsular Malaysia who had given him samples of draft agreement. Hence the fact that the printing of scratch coupons in Sabah at that time was virtually non-existent unless special investments were made were relevant factual matrix that could not be ignored by the learned judge. We would further add that DW1 himself had admitted during the unsuccessful impeachment proceedings to discredit him that the appellant through PW2 had specifically informed him that the appellant would be making the required investment on the silk screen printing machines. The testimony of PW3, PW4 and PW6 from whom the respondent had also inquired and obtained a quote for the printing of the scratch coupons had all testified that the printing of scratch coupons in Sabah at that time was non-existent and that huge investments were required due to the special security in the scratch coupons.

[31] Applying the above principles of law and also the factual pattern or situation of this case, we are consequently led to one inevitable conclusion that the inference which the learned judge should have made in applying the reasonable expectation of honest men and the yardstick of the reasonable expectations of sensible businessmen was that the appellant would not have proceeded to invest in the extra machineries, rented extra spaces, purchased extra and different papers and materials unless there was a firm contract with

the respondent with a minimum monthly commitment of 1.5 million sheets of scratch coupons per month and not based on LPOs otherwise the appellant would not be able to pay for its monthly leasing. The committed quantity of 1.5 million sheets of scratch coupons was indeed a fundamental term of the contract between the appellant and the respondent. This was supported by the fact that this term appeared as one of the requirements in the appellant's quotation dated 26 July 2003 which the respondent had not rejected outright in their letter of award dated 31 July 2003.

[32] The monthly commitment was to cushion the monthly leasing which the appellant was required to pay. Lest it be forgotten, at that material time the respondent was in the process of replacing the manual system with the coupon system for parking collections in Kota Kinabalu. Further, looking at the respondent's letter of award dated 31 July 2003, the respondent had clearly stated that their daily collection of parking was in the sum of RM20,000 which was also the daily penalty imposed if the appellant failed to deliver the coupons as required. As the letter of award had manifestly demonstrated, this showed a huge amount of coupons was inevitably required by the respondent. The learned judge had therefore erred when His Lordship held that the respondent was not in breach of the contract between the appellant and the respondent when the respondent failed to order 1.5 million sheets of coupons a month as this fundamental term was clearly provided and the surrounding circumstances of the case eminently evinced the intention of the parties at that relevant time to commit such monthly quantity delivery of which would be *vide* the respondent's LPO. The actual order might vary but the monthly estimate would be 1.5 million sheets. This was also the reason why the appellant was required to keep a one month stock so as to ensure the continuous supply of the coupons which partly was to cater for the long printing process and the possibilities of machine breakdown. This is the most logical interpretation of the contract between the appellant and the respondent in view of the factual matrix of this case at the time in question.

[33] The learned judge had disallowed the appellant's claim with regard to the sum of RM353,561.50 which was for the coupons the appellant had proceeded to print before receiving the respondent's suspension letter dated 29 April 2004. The learned judge held that the appellant had proceeded to print without receiving the respondent's LPO and also that the oral testimony of PW2 was an attempt to contradict the terms of the concluded contract. With due respect, the learned judge had erred in deciding so. This is because the evidence during the trial showed that the respondent had forwarded a copy of their implementation schedule for coupon system which clearly indicated and led the appellant to believe that the appellant was to commence printing from 27 September 2003 onwards. Further, the evidence adduced showed the long printing process involved which could require some time to complete. DW1's testimony during the impeachment proceedings had revealed in detail the printing process for the scratch coupons and the

respondent knew that it would require time. PW2 too, as we have shown above, had testified as to the overall and continuous process to print the scratch coupon that would take a while. Hence, it is not a matter of days that the appellant could produce the coupons unless there were ready stocks available.

[34] As earlier-mentioned, the respondent had, *vide* a letter dated 14 February 2004, instructed the appellant to proceed to print the coupons and in the same letter the respondent had informed the appellant in very clear terms that the coupon system was to be launched in Kota Kinabalu by the Mayor of Kota Kinabalu on 25 February 2004 and that the Mayor had expressed his expectation that the coupons were to be available for sale to the public the following day after the launching. The evidence we gleaned from the record of proceedings showed that the respondent's first LPO was only issued to the appellant on 21 February 2004. Thus, if the appellant had waited for the respondent's LPO before proceeding to print the coupons, what then would the respondent sell on 26 February 2004?

[35] While it may be true that these correspondences did not mention that the appellant was required to print 1.5 million sheets of the coupons, looking at the overall evidence of the case including the three documents together with the long printing process and the very high daily liquidated damages which the appellant would be liable for failure to deliver that is RM20,000 per day, a reasonable and honest man would have done what the appellant had done in this case.

[36] The learned judge in merely allowing the appellant's claim in the sum of RM39,422.40 being the cost incurred in changing the design of the coupons appeared to have contradicted his own decision that the appellant was only required to print based on the respondent's LPO and nothing else. This is because the evidence had shown that the appellant's claim in the sum of RM39,422.40 arose from the appellant's invoices which were dated 16 February 2004 well before the respondent's first LPO which was dated 21 February 2004. These printing charges were for the change of design on 400,000 pieces of coupons made by the appellant at the request by the respondent *vide* their letter dated 14 February 2004. Therefore, if there was no requirement to print and to keep stocks and instead the appellant had to wait for the LPO, the need to make those changes to the 400,000 pieces of coupons would beg the explanation from the respondent. The learned judge had obviously misdirected himself in saying that this change of design did not relate to monthly orders. In fact, these were the changes made to the stocks of pre-printed coupons in preparation for the monthly order. The respondent, we observe, did not deny this, instead they issued a letter to the appellant confirming the sum was owing to the appellant.

[37] The question had arisen in consequence of the claim for this sum and the respondent's confirmation of the same that is, why were there pre-printed coupons of 400,000 pieces? Further, when the appellant had issued the letter

dated 16 February 2004 and in enclosing the invoice for the sum of RM35,422.40 which had clearly stated that it was due to the change of design as per the respondent's instructions, there was no denial from the respondent of the sum or query from them on why the appellant had proceeded to print those 400,000 pieces of coupons without receiving the respondent's LPO.

[38] Further, looking at the conduct of the respondent as appeared in the minutes of meeting with Dewan Bandaraya Kota Kinabalu (DBKK) on the coupons issue, dated 24 November 2003 and 6 January 2004, DW1 had clearly on at least two occasions informed DBKK of the fact that the coupons had already been printed and that the costs of the stock and material were in the amount of RM400,000. These were times when the respondent had not even issued any LPOs yet. It would be reasonable to infer from this evidence that the respondent knew and had instructed the appellant to print the coupons even without the respondent's LPO. Even the third party in a meeting dated 4 October 2004 knew of this fact. Clearly, the learned judge had misdirected himself in not taking this clear and logical evidence into consideration when deciding on this issue.

[39] There was, as we have shown above, sufficient evidence that proved on the balance of probabilities that the respondent had breached the contractual obligation to accept delivery of or to order the estimated volume of 1.5 million sheets of car parking coupons per month from the appellant as agreed in the contract. Premised on this breach, the appellant's claim herein is for the reliance costs that is the expenses incurred prior to the contract and in contemplation of the due performance thereof. As *Pollock & Mulla - Indian Contract & Specific Relief Acts*, 13th edn, vol. II at p. 1553 states:

> Expenses incurred prior to the contract and in contemplation thereof maybe recovered in an action for the breach of contract if they were within the reasonable contemplation of the parties at the time of making the contract. Such expense must have been incurred in reliance on the due performance of the contract. This is the expenditure incurred by the plaintiff in the expectation that if the contract is made, the expenditure will be needed to enable him to perform the contract, and he will be able to recoup the expenditure from the benefit of performing the contract i.e. the price or the profits expected from the performance.

Section 74 of the Contracts Act 1950 sets out the consequences of a breach of contract. Briefly, the court has recognised that, under s. 74, the party may recover any loss or damage which naturally arose in the usual course of things or which the parties knew, when they made the contract, to be likely to result from a breach of the contract (see *Law of Contract: Dato Seri Visu Sinnadurai*, 4th edn, vol. 1, at p. 1064).

[40] *Pollock & Mulla - Indian Contract and Specific Relief Acts*, *supra* describes at p. 1539, the test of remoteness as follows:

> In deciding whether damages are too remote, the test is whether the damage is such as have been in the contemplation of the parties as being "possible result" of the breach. If it is, then it cannot be regarded as too remote. The damages are to be assessed on the basis of natural and probably consequences of the breach. Actual knowledge must be shown, mere imprudence and carelessness is not knowledge.
>
> The defendant is liable only for reasonably foreseeable losses-those that a normally prudent person, standing in his place possessing his information when contracting would have reason to forsee as probably consequences of future breach.

The principles of damages basically is to put the appellant in the same position so far as money can do so, as if his rights have been observed. Therefore, the learned judge's analysis of the clear intention of the respondent in agreeing to such a term was that they were only interested in buying a finished product and was not concerned with any aspect of the appellant's production costs is not the criteria in assessing damages and is therefore irrelevant.

[41] The relevant issue is, in our view, on remoteness of damage. Remoteness of damage basically hinges on the knowledge of the respondent that the appellant would be making those investments as claimed by the appellant. The investment costs incurred by the appellant, we would say, are not too remote based on the facts and evidence. DW1 had clearly admitted that the appellant did inform him about having to make an investment on the silk screen printing machine that is the Sakurai and Wicket Dryer machines. The respondent's knowledge is clearly manifested in the minutes of meeting dated 4 October 2004 wherein it was noted the investment made by the appellant. The respondent had prior to the implementation of the coupon system in Kota Kinabalu carried out months of preparation and DW1 clearly admitted that he started preparing for it in 2002 as this system would affect his printing costs as compared to the previous manual system. The respondent therefore knew the investments which the appellant would be making in order to honour his part of the bargain.

[42] The evidence additionally showed that from the respondent's dealings and inquiries, they had dealt with and approached three other printers whom the appellant had subpoenaed to testify in the court below. It was in evidence that the printing of the scratch coupon required special skills and investments due to the security feature involved and that nobody in Sabah would be able to do it unless such investments were made. Special machines (silk screen printing) would have to be acquired. PW3 testified that he had gone to Kuala Lumpur with DW1 to visit a particular printer who had gone to the extent of producing certain designs for the respondent. PW3 confirmed that local printers were not able to do it because of the security feature involved.

[43] PW4 testified that he was approached by DW1 to print the scratch type coupons. He had provided designs to the respondent. PW4 specifically testified that he did inform DW1 that he would be making extra investments in order to cater for the printing if the respondent had awarded to him the printing of the scratch coupons contract. During cross-examination, PW4 testified that he would need to make extra investments in the region of RM1,000,000 to RM1,500,000 for the machines only. This figure according to PW4 excluded workers, materials like papers, ink and store facilities and a bigger space to put the machines. Two other witnesses who were printers in Sabah for the last 20 years had also testified that in Sabah no one was able to do silk screen printing or scratch coupons unless investments were made for the special machine, skills and knowledge. This is therefore a fact which cannot be ignored. DW1 having done his research in the market surely could not say he did not know of this fact. The evidence therefore goes to show that the respondent had the actual knowledge of the type of investments that the appellant would make in order to perform the contract.

[44] The actual knowledge of the DW1 could further be gauged from his very exact and precise testimony on the printing process during examination in chief by the respondent's own counsel. Obviously, DW1 knew exactly what he was talking about. Hence, we are satisfied that the damages on reliance costs is within the contemplation of the respondent and is not too remote. The damages which the appellant would suffer for the breach of contract is indeed not too remote in that a reasonable person in the position of the respondent would have concluded upon consideration of the matter that the given type of loss was likely to result.

We refer on this point, to *Pollock & Mulla - Indian Contract and Specific Relief Acts*, *supra*, which states at p. 1546 as follows:

> The word "contemplated" merely requires a level of prediction, and does not import any voluntary assumption of responsibility. The defendant is not required to have contemplated (or to have been in a position to contemplate) the exact nature, extent, scale or origin of the loss suffered.

During the trial of this case, the appellant had produced documentary evidence to prove that the relevant investments were made for the machineries. A tenancy agreement was tendered as an exhibit to show that the appellant had rented extra premises to store the new machines, invoices were produced to show that chemicals, ink and blocks were purchased and installation costs incurred and photographs were tendered of the printed stocks and chemicals and machines. Further, witnesses namely PW3 and PW10 were called to prove that the relevant purchases were made and special skills and knowledge were required. PW10 had also confirmed that payments were made by the appellant. The appellant had clearly proven their case that they had suffered loss and damage as a result of the breach of the contract. The learned judge therefore had misapprehended the evidence in dismissing the appellant's claim in respect of all the other claims of the appellant.

Conclusion

[45] The appellant's claim had been convincingly established on the balance of probabilities. We make this finding as it is obvious that on critical examination of the whole evidence there was in existence a concluded contract between the appellant and respondent based on the three documents, other documentary as well as oral evidence and the conduct of both parties in the whole transaction in respect of which it was probable that both parties had agreed that the estimated quantity of car parking coupon of 1.5 million sheets per month was to be supplied by the appellant to the respondent which contract the appellant had successfully shown that the respondent had breached when they failed to accept the delivery of or to order the coupons based on the volume agreed therein. The appellant had also shown that they had suffered loss and damage as a direct consequence of the breach of the contract. The learned judge, we find, had erroneously decided that the appellant had only proved their claim for the sum of RM39,422.40 and dismissed all the other claims. For the reasons discussed, the appellant had, in the instant action under consideration, successfully proved their claim on the balance of probabilities and we are inexorably driven to the conclusion that the respondent was liable for the breach of the contract. We therefore allow the appeal and grant judgment on the issue of liability for the appellant.

[46] As regards damages, we affirm the learned judge's order in prayer (a) of the statement of claim that judgment be entered against the respondent for the sum of RM39,422.40. However, the learned judge's dismissal of all the other claims of the appellant as set out in prayers (b) and (c) is set aside, and we allow the appellant's appeal in respect of the same and order that the precise quantum of damages that has to be paid to the successful litigant namely the appellant be appropriately assessed by the Senior Assistant Registrar of the High Court where the evidence from relevant witnesses will be presented to assist the court in determining the suitable quantum of damages to be awarded. The interest awarded by the learned judge which is based on the prevailing rate under the law should appropriately be maintained and we award costs of RM40,000 to the appellant here and below. The deposit shall be returned to the appellant.